JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 106/92

BEFORE: THE HON MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

BETWEEN	PATRICK VALENTINE	DEFENDANT/APPELLANT
AND	NICOLE LUMSDEN (An Infant)	
AND	LASCELLES LUMSDEN (Next friend)	PLAINTIFF/RESPONDENT

Christopher Samuda, instructed by Piper & Samuda, for appellant

Trevor Robinson for respondent

September 27, 28, 29 and December 6, 1993

FORTE, J.A.:

I have had the opportunity to read in draft the judgment of Downer, J.A., which follows hereafter, and am entirely in agreement with the reasoning and conclusion contained therein. I would allow the appeal.

DOWNER, J.A.:

The appellant Patrick Valentine seeks to dismiss for want of prosecution a negligence action brought against him by Lascelles Lumsden the father and next friend of Nicole Lumsden an infant. The learned Master dismissed the summons filed 22nd April, 1992, returnable 18th May, 1992. Valentine has appealed against that order. The incident which gave rise to the action occurred on 13th March, 1986 and the infant plaintiff suffered serious injuries therefrom.

The history of the action was detailed in the affidavit

of Christopher Samuda, the attorney-at-law for the appellant Valentine. The writ was filed on 31st May, 1989, three years after the accident. Proceedings started off on the wrong footing as the writ was not served personally on the appellant and further, the institution of proceedings was irregular. The appellant Valentine entered a conditional appearance to set aside the writ. As a result of this, the respondent early in December 1989, filed the relevant documents, consent to act as next friend, the undertaking as next friend and certificate of attorney.

The next stage in these proceedings was that there was an invitation to commence negotiations between Clinton Hart and Company, the appellant's attorney-at-law and Trevor Robinson for the respondent in January 1990. There was no response to this initiative. Thus further efforts were made in March and April and there was still no response. Then in late April there was a response but the negotiations broke down by the 4th June, 1990 and a defence was filed.

Despite the filing of a defence, the respondent took no steps to prosecute the action. Meanwhile there were changes in the representation of the appellant's attorney-at-law. Piper and Samuda replaced Clinton Hart and Company and the respondent was notified. Piper and Samuda reviewed the matter and suggested to the respondent that they should institute proceedings against the owner, driver and conductor of the motor vehicle which they contended caused the accident. This aspect of the matter was already pleaded in the respondent's defence. Since that defence was filed, it must have been clear to Trevor Robinson, the attorney-at-law for the respondent, that there was then no prospect of a settlement in view of the evidence the respondent proposed to marshall at the trial. The matter ought then to have proceeded within the time frame of the provisions of the Civil Procedure Code. The respondent should have replied, if necessary, and then taken steps to have a summons for directions heard. See sections 229 and 272 of the Civil Procedure Code.

It is pertinent to point out that at this stage five years had elapsed since the date of the accident, but it was still within the limitation period of six years.

The basis of Mr. Samuda's submissions was that there was inordinate delay in prosecuting this action, that his client was severely prejudiced by the delay. He was prejudiced because since the accident, there has been significant devaluation of the dollar with the consequential inflation thereto. Further, any decision against the appellant may result in an award which exceeds the limit of his insurance policy. That this factor may be relevant see **Department of Transport v. Chris Smaller (Transport) Ltd.** (1989) 1 All E.R. 897. Again the appellant states that he is now unable to find the witnesses who would testify as to his version of the accident. This is of importance because as adumbrated in his defence, the accident was caused by others.

What has been the response of Trevor Robinson, the attorney-at-law for the respondent? He states that the case file was mislaid since April 1991 and was not found until 21st May 1992, nearly a month after the limitation had elapsed and four years after he had perfected the institution of proceedings. Mr. Samuda's apt response was that he could have made up a duplicate from the court files or sought his assistance. Further, an attorney-at-law is not permitted to seek special consideration because the victim of the accident was an infant. The law has provisions for a representative for those with legal incapacity as infants and mental defectives. So in addition to the inordinate delay, there was no justifiable excuse offered by the respondent in this case.

What do the authorities ordain in these circumstances?

There are three features to note as regards the circumstances of this case. Firstly, the inordinate delay was caused by the respondent's attorney-at-law. Secondly, there was no justifiable excuse, and thirdly, it does not matter that the plaintiff may not have a remedy against his solicitor. As for

inordinate delay, the courts have taken a stern attitude towards inexcusable delay especially in running down actions which depend largely on the personal recollection of witnesses. Even the best of memories falter after a lapse of six years and so it may be impossible to obtain a fair trial. Since the limitation period is six years the law contemplates hearings after six years in instances where the writ was filed just in time. Once, however, the case is within the system, the court has a measure of control over the pace of progress in accordance with the rules of procedure. This was emphasised since the modern trend began in **Allen v. Sir Alfred McAlpine & Sons Ltd.** (1968) 1 All E.R. 543. The fundamental documents in common law jurisdictions all reflect this insistence on promptness in hearing issues.

In **Allen** (supra) Lord Denning, M.R., at page 548 refers to Magna Carta thus:

> "Magna Carta will have none of it. '...To no one will we deny or delay right or justice'."

The same sentiments are expressed in Section 20(2) of our Constitution. The headnote in **Allen** (supra) states the principle accurately. It reads at page 544:

> "**Held:** (i) in the first and third appeals there had been inexcusable delay due to the negligence of the plaintiffs' solicitors, and it was not possible to have a fair trial after so long a time; accordingly the actions should stand dismissed."

The principle was applied in **Fitzpatrick v. Batger & Co. Ltd.** (1967) 2 All E.R. 657 and in **Gloria v. Sokoloft** (1969) 1 All E.R. 204 where liability was admitted but the Court of Appeal felt that six years after the accident was so long a period that there could not be a fair trial on the issue of damages. It must be borne in mind, however, that the limitation period for personal injuries action in England is three years.

Much emphasis was laid on the fact that the victim was an infant. Since the rules of court provide for the next friend as her representative, there can be no exception. For instance, Winn, L.J. refers to a person under a disability in **Martin v.**

Turner (1970) 1 W.L.R. 258. In demonstrating that the court does not regard disability as a special factor where delay is concerned, His Lordship states at page 261:

> "Every person in this country who is of full age and suffering from no disability is entitled to come to the court and, in accordance with the rules of the court, conduct litigation in an attempt to recover damages, or assert another claim in respect of what he has suffered. If, as Davies LJ has indicated, Dr. Blair was really intending to be precisely judicial in assessing the degree of responsibility of the plaintiff by (for example) the McNaghten rules, then he certainly did not declare him to be, or have been, insane. On the other hand, if he had taken that view, then proceedings could have been brought under RSC Ord 30 which would have enabled representation to be afforded and this claim to have been competently presented on behalf of the injured man. If he was not under such a disability as can be dealt with under the provisions of that rule, then he must be held responsible for his process of litigation."

The same principle applies to an infant. It is important to reiterate that once a matter is before the court, then the court controls the pace of litigation and rules are designed to ensure promptness. This was recognised and acted on in **Kerr v.National Carriers** (1974) 1 Lloyds Law Report 365 at page 367 to 368 where Edmund Davies LJ puts it thus:

> "Accordingly, there is a supervising duty vested in the Court of scrutinizing cases such as the present."

Turning to the issue as to whether there was a justifiable excuse, **Allen v. McAlpine** (supra) again shows the way. Although there was delay in **Bostic v. Bermondsay & SouthWark Group Hospital Management Committee** (1968) 1 All E.R. 543 the second case in the group heard together with **Allen** (supra), the plaintiff's solicitor and the solicitor's clerk were in prison for criminal offences. The plaintiff was not aware of that and the nature of the evidence in the case was such that the court found that the defendant would not be prejudiced by delay. So the action was not dismissed for want of prosecution. No such exceptional circumstance exists in this case. So there is no acceptable excuse.

The appellant's attorney-at-law suddenly found the case

file after six years and summons to dismiss for want of prosecution was filed. Since the inordinate delay in this case was caused by the victim's attorney-at-law, Trevor Robinson, it is pertinent to examine his responsibility to the victim in the light of the authorities. The following passage in the speech of Lord Diplock in **Birkett v. James** (1977) 2 All E.R. 801 at page 809 is instructive:

> "Where an action is dismissed for want of prosecution the fault must lie either with the plaintiff or with his solicitors or both. Which of them is to blame for the inordinate and inexcusable delay does not affect the prejudice caused to the defendant, which is the justification for the dismissal of the action; nor should it, in principle, affect his remedy. If it were a matter which the judge ought to take into account in deciding whether to dismiss the action, the court on an interlocutory application in an action between different parties would have to embark on what in effect would be the trial of an action by the plaintiff against his actual or former solicitor for professional negligence. That, clearly, is impossible, and apart from an initial hesitation by Sachs LJ in Sayle v. Cooksey (1969) 2 Lloyd's Rep 618 at 625, there has been a consensus of judicial opinion in the Court of Appeal that the question of what remedy, if any, the plaintiff will have against his solicitors if his action is dismissed is an irrelevant consideration: Paxton v Allsop (1971) 3 All E.R. 370, (1971) 1 W.L.R. 1310."

It must not be thought that the courts are unconcerned with the outcome of its decision on the victim. Here is how Salmon LJ puts it in **Allen** (supra) at page 562:

> "On this point I cannot usefully add anything further to what has fallen from my lords or to what I have said about it in Fitzpatrick's case (1967) 2 All E.R. 659. Plaintiffs are sometimes completely unsophisticated. They accept with resignation the passage of years with nothing happening. They vaguely attribute all this to what they have heard called 'the law's delays'. They have no idea that it is usually the fault of their own solicitor that their case has not been tried or settled long ago. Whenever such cases are dismissed for want of prosecution, the court should, in my view, take steps to ensure that the plaintiff is personally informed of the decision and briefly of the reasons for which it was made."

Accordingly, the Registrar ought to take steps to inform the victim and his next friend of this decision and reasons for which it was made.

Conclusion

In the light of the foregoing, I would allow the appeal, set aside the order below and order the respondent's attorney-at-law, Trevor Robinson to pay the taxed or agreed costs both here and below.

PATTERSON, J.A. (AG.):

I agree that this appeal should be allowed and that the action be dismissed for want of prosecution. The evidence which the Master had to consider clearly established, in my view, that the respondent was guilty of inordinate and inexcusable delay in prosecuting the action. The cause of action arose out of injuries suffered by the infant plaintiff on the 13th March, 1986. The writ of summons, accompanied by the statement of claim, was filed on the 31st May, 1989, and the defence on the 19th June, 1990. Thereafter, the matter went to sleep. The limitation period went by in March 1992, and on the 22nd April, 1992, the appellant filed his summons to dismiss the action for want of prosecution. The excuse proffered by the respondent could hardly be said to be sufficient. His attorney-at-law had mislaid the file since April 1991 and it was not discovered until the 21st May, 1992. But nothing had been done by him since the defence was filed, and it would appear that his file was discovered as a direct result of the service of the appellant's summons on him.

The appellant did not only prove that there was inordinate and inexcusable delay on the part of the respondent's attorney-at-law, but also that the delay resulted in severe prejudice to him, and had given rise to the possibility that a fair trial was no longer possible. That evidence was uncontroverted, and in my view, it satisfied the principles laid

down in **Allen v. McAlpine** (1968) 1 All E.R. 543 for the exercise of the court's discretion.

I am satisfied that the Master erred in principle. If full weight had been given to the evidence, then the only reasonable exercise of the Master's discretion would be to dismiss the action for want of prosecution. In the circumstances of this case, it is open to this court to reverse the decision of the Master and to substitute its discretion for that of the Master, and order that the action be dismissed for want of prosecution.

FORTE J A

The appeal is allowed and the order below set aside. Attorney-at-Law, Mr. Trevor Robinson to pay the costs both here and below. Costs to be taxed if not agreed.

Cases referred to

(1) Department of Transport v Chris Smaller (Transport) Ltd (1989) 1 All E R 897.

(2) Allen v Sir Alfred McAlpine & Sons Ltd (1968) 1 All ER 543

(3) Fitzpatrick v Batger & Co Ltd (1967) 2 All ER 652

(4) Colvia v Sokoloff (1969) 1 All ER 204.

(5) Martin v Turner (1970) 1 W.L.R 258.

(6) Kerr v National Carriers (1974) 1 Lloyd's Rep 365

(7) Bostic v Bermondsey & Southwark Group Hospital Management Committee (1968) 1 All ER 573.

(8) Burkett v James (1977) 2 All ER 801.